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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,
vs.
W. T. GRANT COMPANY, S. H. KRESS & COMPANY AND JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF APPELLEE, THE KROGER COMPANY, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Of Counsel.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2

Civil Action No. 73-298

2

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UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., AND JOHN M. HANCOCK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEE, THE KROGER COMPANY, IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7, par. 3 and Rule 12, par. 3 of the Rules of the Supreme Court of the United States, appellee, The Kroger Company, submits the following statement in opposition to appellant's statement as to jurisdiction, and moves to dismiss the appeal or affirm the final judgment of the District Court.

I. Jurisdiction

The jurisdiction of this Court to review the decision of the district court is invoked by appellant under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 15 U. S. C. Section 29, 1946 Supp., Vol. IV, p. 601.

II. Questions Presented

Whether a substantial question, justifying review by this Court, is raised by the exercise of a trial court's discretion to dismiss as moot an action alleging an unlawful interlocking directorate, under Section 8 of the Clayton Act, when the challenged conduct had been discontinued prior to trial of the action and the record established the absence of any reasonable expectation that it would be resumed.

The Court's attention is also respectfully directed to the following point which was presented below, but upon which the District Court found it unnecessary to rule: Even if the case should not be held to be moot, dismissal of the action for lack of jurisdiction would be required as to the corporate appellees because Section 8 of the Clayton Act, under which this action was brought, is directed solely towards individuals, whereas corporate liability for an unlawful interlocking directorate is exclusively imposed by Section 11 of the Clayton Act, authorizing proceedings only by the Federal Trade Commission.

Statutes Involved

The pertinent provisions of Sections 8, 11 and 15 of the Clayton Act are as follows (38 Stat. 732, 734, 736, 15 U. S. C. Sections 19, 21, 25 (1946)):

Sec. 8

"* * * *no person at the same time shall be a director in* any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws . . . ."

* * * * * * *

Sec. 11

". . . authority to enforce compliance with sections two, three, seven, and *eight* of this Act by the persons respectively subject thereto is hereby vested . . . in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows: * * *."

"Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and *eight* of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing . . . If upon such hearing the commission, . . . shall be of the opinion that any of the provisions of said sections have been or are being violated, it . . . shall issue . . . an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act . . . ."

* * * * * * *

Sec. 15

"That the several district courts of the United States are hereby invested with jurisdiction to prevent

and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations . . ."

IV. Statement of the Case

Appellant, plaintiff below, is appealing from a summary judgment dismissing the complaint in this case and in two companion actions, alleging violations of Section 8 of the Clayton Act. Each action named as defendants the same common director, Mr. John Hancock, and two allegedly competing corporations, different in each case. All three actions were instituted pursuant to Section 15 of the Clayton Act and sought broad injunctive relief against violations of Section 8 of the same Act. This motion and statement are particularly addressed to the action naming Mr. Hancock, The Kroger Company and Jewel Tea Company, Inc. as codefendants.

The record below is plain that Kroger took immediate remedial steps upon learning of the government's view of the challenged interlock—and notwithstanding its belief that the activities of Kroger and Jewel do not satisfy the requirement that "the elimination of competition between [them] would constitute a violation of the antitrust laws."[1]

The unchallenged facts show that until February 6, 1952 Kroger had no indication that the Government considered it in violation of the Clayton Act in consequence of the presence of Mr. Hancock on its Board and Jewel's. On February 7, Kroger's president, Joseph B. Hall, was first apprised by Mr. Hancock that the Department intended to

[1] For example, of Kroger's 2000 retail food stores, located in 19 different states, only 38 are situated in a market where Jewel also maintains such outlets. This is the Chicago area where Jewel operates 150 stores. Elsewhere Jewel sells its products by door-to-door solicitation. Kroger nowhere engages in such solicitation. (Complaint, pars. 5-10).

institute proceedings against the Company and himself on charges of violating Section 8 of the Clayton Act. On the next day, at a special meeting called to consider this information, Kroger's Board of Directors instructed its president to request Mr. Hancock not to stand for reelection as a director at the Company's regular annual stockholders' meeting, scheduled for March 5, 1952. Mr. Hall so advised Mr. Hancock. This action was filed on February 27, 1952, six days before the annual meeting. At that meeting, of March 5, 1952, Mr. Hancock formally and publicly withdrew as a candidate for reelection to the Board (Affidavit of Thomas T. Oyler, General Attorney, The Kroger Company, pars. 3-9, inclusive).

Mr. Hancock's sworn affidavit in this action affirms that he will never serve as a director of Kroger so long as he is a member of Jewel's Board (Affidavit of Mr. Hancock, p. 3). The sworn affidavit of Kroger's General Attorney, also filed herein, affirms that the corporation will not nominate or propose Mr. Hancoc for election to its Board "and to the full extent of its powers will not suggest or encourage his election" (Affidavit of Mr. Oyler, par. 9).

There is no suggestion in the record that any other director of Kroger has ever served on the Board of a competing corporation.

V. Opinion Below

The opinion below is unreported. It is reprinted in full as Appendix A annexed to Appellant's Statement as to Jurisdiction.

On the basis of the uncontested facts, the district court (Conger, J.) dismissed the case against Kroger and the other defendants. He found that there was "no showing of direct knowledge on the part of the corporations" before February 1952 that the Department of Justice or any other

enforcement branch of the Government considered Hancock's dual directorship to constitute a Section 8 violation by the corporations. The corporation's prompt action thereafter to remove the source of the Department's complaint (similar to that taken in each of the companion cases by one of the allegedly interlocked corporations) convinced the court below that "Hancock's removal from these directorships has apparently remedied all the grievances the Government had." The court noted further that Hancock's unqualified resignation from the Boards had already accomplished the only purpose which a Section 8 injunctive decree could serve in the case. As far as any further violations were concerned, the court did not feel that there was "the *slightest* threat that the defendants will attempt any future activity in violation of Section 8" (Memorandum, p. 4; emphasis supplied).

The court below felt it unnecessary to pass upon other jurisdictional objections to the proceeding asserted by the corporate defendants. These were grounded on the premise that Section 8, by its very terms, imposes no corporate liability when an individual director violates the prohibition against serving on the boards of two competing concerns, so that exclusive jurisdiction of proceedings against interlocked corporations is vested in the Federal Trade Commission under Section 11 of the Clayton Act.

VI. ARGUMENT

(a) The Question Presented by This Appeal Is Not a Substantial One

No question of substantial or general importance in the construction or enforcement of Section 8 of the Clayton Act is involved in this case. The only issue here is whether the lower court abused its discretion in deciding that the case was moot. The parties and the judge below are agreed

on the familiar legal principles material to issues of mootness. The sole question is whether, under the particular facts of this case, the judge correctly applied those principles. The decision of that question is of no importance beyond the limited circumstances of this case and does not warrant review by this Court. Neither is there any showing that the decision below conflicts with that in any similar case, or that it was an abuse of discretion or clearly erroneous.

The legal criteria on issues of mootness have been established in numerous Supreme Court decisions. They are: (1) The question is primarily one for the discretion of the trial judge under a few general rules. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 422 (1945). (2) It is not enough, of course, to render a case moot that the defendant has discontinued the illegal practices after suit has been filed. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897). (3) It must also appear from the facts that "there is no reasonable expectation that the wrong will be repeated." *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945).

The lower court expressly adhered to these traditional principles in deciding that this case was moot. It repeated the standard formula in mootness cases that "to disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated" (Memorandum, p. 4). In the light of the facts before him, the court then concluded: "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already]."

There can be no question that there was ample basis for the court's finding. Certainly, it did not abuse its discretion, nor was its conclusion "clearly erroneous". The

court had before it not merely the fact of Mr. Hancock's termination of his directorship, but also the facts that Kroger, like corporate defendants in the companion cases, moved promptly, with the cooperation of Mr. Hancock, to eliminate the challenged interlock; that Kroger did not have knowledge that the Department of Justice claimed that it was in violation of the statute until the very month in which these proceedings were instituted; and that Kroger affirmed that it would not thereafter propose or encourage the selection of Mr. Hancock as one of its directors.

There is absolutely no basis for challenging Kroger's statement of facts or its affirmation of intention, or that of Mr. Hancock. No countervailing affidavits were submitted below, nor was there any intimation of a pattern of prohibited affiliations on the part of the corporations concerned. Not a single other instance of their participation in an allegedly unlawful interlock was cited.

Moreover, the result below is in accord with the only other Section 8 case involving mootness. There is thus no conflict of decisions to be resolved by this Court. In *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio, 1935), the court dismissed as moot a Section 8 case involving substantially similar facts where the director resigned from one of the competing corporations before trial.

The cases cited by appellant to establish the asserted error of the decision below, such as *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897), have no bearing here. They involved complex conspiracies. They were characterized by intricate patterns of business practices and subtle relationships of an inherently continuing nature.

No such factors are present here. The relationships in question are simple in character and have been definitively terminated. Nor could they be surreptitiously resumed.

Because the securities of the corporations concerned are listed on the New York Stock Exchange, the identities of their directors must be regularly disclosed to their stockholders and to the Government through the SEC. In these circumstances appellant has effectively achieved the relief contemplated by the statute. As one of the senior officials of the Antitrust Division of the Department of Justice has recently stated (Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L. J. 1266, 1271 (1950)):

> "In Section 8 matters, the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

On this record, it necessarily follows that the court clearly acted within the area of its discretion in concluding that there was no showing of a threatened repetition of the challenged relationship and that the action should accordingly be dismissed. Moreover, as the court below further stated, its "decision would not be a bar to a new suit in case possible violations arise in the future" (Memorandum, p. 5).

Finally, on the evidence before the Court, the decision below precisely obeys the fundamental precept of substantive equity law recently enunciated by the Court as follows, and with specific reference to antitrust cases (*U. S.* v. *Oregon State Medical Society*, 72 S. Ct. 690, 695 (1952)):

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations."

As the Court went on to state in that case, what is essential to injunctive relief is a showing of "a real threat of future violation or a contemporary violation of a nature

likely to continue or recur." (*Id.*) No such "threat" is revealed by this record and there is accordingly no occasion for further proceedings in this matter. They would be of no benefit to the Government. The only result would be to subject the appellees to the familiar and onerous burdens and expense customarily incident to antitrust litigation. It is estimated, for example, that the mere necessity of complying with the interrogatories already served by the appellant, and included in the record on this appeal, would require a year's time and cost Kroger at least $250,000 (Affidavit of Mr. Oyler, par. 12).

(b) There Is No Jurisdiction in the Federal Courts to Entertain a Section 8 Action Against a Corporation.

In the court below, it was argued that in the event that the complaint was not dismissed for mootness, it should be dismissed as to the corporate defendants because the statute does not vest original jurisdiction as to them in the federal courts. The court found it unnecessary to pass on this point since it held that the controversy was moot. The Government does not mention the point in its appeal.

Section 8 of the Clayton Act is cast exclusively in terms of the offending director: "No person at the same time *shall be a director* in any two or more corporations . . . ." (15 U. S. C. Section 19). Its prohibitions are not directed to the corporation, but to the individual director. The only reference to the interlocked corporations appears in Section 11 of the Act. This vests remedial authority exclusively in the Federal Trade Commission to "issue an order . . . requiring [a] person [including a corporation] to . . . rid itself of the directors chosen contrary to the provisions of section[s] . . . eight of this Act" (15 U. S. C. Section 21).

This limitation of Section 8 is substantive. That section does not define an offense by the corporations. Section 15, vesting the Department of Justice with general authority to enforce the Act, does not supply this deficiency. That provision is purely procedural and does not extend the substantive coverage of Section 8. Similarly, Section 11 does not enlarge the scope of Section 8 so as to make the corporations, as well as the individual directors, liable to direct suit in the federal courts. Rather, Section 11 is designed to supplement the provisions of Section 8 by authorizing the Federal Trade Commission to institute proceedings against the interlocked corporations to make them rid themselves of the interlock caused by the offending director—the precise action which has been accomplished in this case by voluntary action.

This construction makes the provisions of Sections 8 and 11 consistent and intelligible, and it is in accord with actions previously taken by the Department of Justice, except for the present cases. In two of the three cases previously brought by the Department, only the individual directors were made defendants. *U. S.* v. *General Outdoor Advertising Company, et al.*, Equity No. 4650 (S. D. N. Y. 1928) and *United States* v. *Rand Kadex Bureau, et al.*, Equity No. 39 (S. D. N. Y. 1926). The complaint in the third, *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio 1935) asked only that the corporate defendants be required to accept the resignations of the directors involved. The Federal Trade Commission has recently issued five complaints seeking relief under Section 11 against allegedly interlocked corporations.[2]

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[2] *Matter of Whitin Machine Works*, FTC Docket No. 6023; *Matter of Vick Chemical Company*, FTC Docket No. 6024; *Matter of Purity Bakeries Corp.*, FTC Docket No. 6025; *Matter of Nesco, Inc.*, FTC Docket No. 6026; *Matter of Allis-Chalmers Manufacturing Co.*, FTC Docket No. 6027.

We submit that the Congress intended that the primary responsibility for avoiding interlocks should be upon the directors themselves. These individuals know their various affiliations, and violations on their part cannot be unwitting. In the case of the corporations, they may not know the facts as to other affiliations of their directors, and these affiliations may change during the director's tenure. The Congress did not, on that account, relieve the corporations of responsibility for their directors, but it determined to enforce that responsibility through the flexible corrective offices and processes of an administrative agency, rather than through proceedings brought by the Department of Justice in the federal courts.

(c) Conclusion

This appeal presents no substantial question for review. The court below simply decided, according to well established legal principles, that on the facts of this particular case, the question of any possible Section 8 violations had become moot. The appeal involves solely the application of those principles to a specific factual situation. The court's decision on the basis of the record before it was correct. Certainly, it was not clearly erroneous, nor is it in conflict with any other Section 8 case decided by any other court.

Apart from the question of mootness, there was no statutory basis for jurisdiction in the lower court to entertain a Section 8 proceeding against the corporate defendants. Section 8 authorizes proceedings only against individual directors.

WHEREFORE, appellee respectfully petitions this Court to dismiss the appeal or to affirm the judgment of the District Court for the Southern District of New York.

Respectfully submitted,

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